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No. 84-1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLETCHER KEITH ADKINSON,
Petitioner,

v.

FREDERICA ANNE ADKINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner correctly states that this case arises in the context of a divorce and child custody proceeding in the Courts of West Virginia, that Petitioner and Respondent were married in 1968 and that a child was born to the Petitioner and Respondent in 1977. In this divorce and custody proceeding both parties sought sole custody of their son, and both parties offered expert testimony at the trial concerning the son's alleged confusion about his sexual identity. It is also true that

one of the Petitioner's experts testified that the boy suffered from an atypical gender identity disorder. The expert testifying on the behalf of the Respondent testified that the son did show some confusion on matters of sexuality, but did not suffer from the said disorder. In short, the evidence was in conflict. Evidence was also offered that the Respondent was a fit parent to have custody of the son, and that the confusion suffered by the son as to his sexuality could have resulted from the prolonged absence of his father from the marital home, even prior to the separation of the parties. After hearing two (2) days of testimony from approximately twenty (20) witnesses, the trial judge determined that the Respondent was a fit parent and should have the custody of the child. The parties had previously stipulated that the Respondent was the primary caretaker of the son prior to the separation of the Petitioner and Respondent.

REASONS FOR DENYING THE WRIT

1. The Primary Caretaker Presumption, as Imposed on the Trial Courts of West Virginia by the West Virginia Supreme Court of Appeals, Does Not Conflict With This Court's Applicable Decisions Regarding Discrimination on the Basis of Sex.

This Court has stated that, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of the children he has sired and raised [which] undeniably warrants deference, and absent a powerful countervailing interest, protection." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 652 (1975) citing *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1971). Respondent agrees with and supports that statement. Further, Respondent believes

that West Virginia's Primary Caretaker Rule provides the protection intended by that statement. Respondent asserts that an examination of *Garska* v. *McCoy,* W.Va. 278 S.E.2d 357 (1981) in light of *Stanley* v. *Illinois, supra,* will reveal the same.

In *Stanley* v. *Illinois,* the State of Illinois removed illegitimate children from the custody of their father on the sole basis that the father and mother of the children were not married. The mother had died and pursuant to Illinois law, the mother's illegitimate children became wards of the State. No hearing was granted the father of the children to determine if the father were a fit parent. Indeed, Illinois law *presumed* an illegitimate father was an *unfit* parent, and in fact did not include the unwed natural father of illegitimate children within the definition of "parents". Ill. Rev. Stat., c. 37, § 701-14. The question before this Court was, "Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?", to which the Court responded, yes. *Stanley* v. *Illinois, supra,* at 649. The presumption before this Court in the instant case is not "constitutionally repugnant".

In West Virginia, a trial court must award custody of children of tender years to the primary caretaker parent, if he or she is a fit parent. *Garska* v. *McCoy, supra,* at 363, regardless of the sex of that parent, Id. at 362. Fitness is defined as being emotionally supportive, providing routine cleanliness, preparing nourishing food or otherwise demonstrating fitness. *J.B.* v. *A.B.,* W. Va. 242 S.E.2d 248, 253 (1978). In such a custody proceeding, both parents are given the opportunity to present evidence that he or she was the primary caretaker of the child prior to the separation of the parties. Additionally, each party is afforded the

opportunity to prove his or her fitness and prove that the other parent is not fit. To determine which parent is the primary caretaker the Court must consider at least the following:

1. Preparing and planning of meals;
2. Bathing, grooming and dressing;
3. Purchasing, cleaning and care of clothes;
4. Medical care, including nursing and trips to physicians;
5. Arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
6. Arranging alternative care, i.e. babysitting, day-care, etc.;
7. Putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
8. Disciplining, i.e. teaching general manners and toilet training;
9. Educating, i.e. religious, cultural, social, etc.;
10. Teaching elementary skills, i.e., reading, writing and arithmetic.

Garska v. *McCoy, supra,* at 363.

The West Virginia court noted that the primary caretaker in this State will most often be the mother, but that given recent continuing changes in society, a father may also prove to fulfill that role. Id. at 360. Thus, the primary caretaker presumption is indeed sex neutral and *does not discriminate* against the Peti-

tioner or anyone. Unlike *Stanley* v. *Illinois, supra,* where there was an absolute statutory presumption that *all* unmarried fathers were unsuitable and neglectful parents, there is no such absolute presumption in West Virginia that a father could not be a primary caretaker, nor is there a presumption that a father is not a fit parent. As the presumption is not discriminatory, the Petition should be denied.

Assuming *arguendo,* that the primary caretaker presumption is discriminatory, does it serve an important governmental objective(s) and is it substantially related to that objective(s). *Craig* v. *Boren,* 429 U.S. 190, 197 (1976). The governmental objective in child custody cases in West Virginia is to determine what is in the best interest of the child. West Virginia Code, § 48-2-15 [1980]. To accomplish that objective the West Virginia Supreme Court of Appeals established the primary caretaker rule for children of tender years. Is that presumption substantially related to the above stated governmental interest? Respondent believes it is.

In *Garska* v. *McCoy, supra,* several reasons were given for the adoption of the presumption at issue. First, the Court noted that the primary caretaker is usually in an inferior financial position to the other parent and that too often the financially superior parent uses a potential custody fight to bargain down child support payments. *Garska* v. *McCoy,* Id. at p. 360. The best interests of the child could not possibly be served by allowing custody to be used to reduce support payments. Thus, the primary caretaker rule is an attempt to put some certainty in custody proceedings and thereby not grant the financially superior parent

an unfair advantage. Id. at 360-361. Also, trial courts are often not able to discern which parent is the more fit, given the fact that most judges are not trained psychologists. Id. at 361-362. Finally, the court noted that as the State Legislature had provided statutory means to simplify divorce proceedings and in turn settle related matters out of court, it was necessary to provide some guidelines and certainty of outcome to protect the parent who may be in an inferior bargaining position. Id. at 362. As the court noted, "custody fights are highly destructive to the emotional health of children." *Garska* v. *McCoy,* Id. at 361. Respondent agrees and submits to this Court that the above stated reasons sustain the rule in question from constitutional attack.

However, the West Virginia court did not stop with the above. It articulated a minimum of ten criteria to be used to determine which parent was the primary caretaker. Id. at 363. At pages 13 and 14 of his Petition, Petitioner argues that the rule and the criteria do not consider what is in the best interest of the child prospectively, but dwell on the past, thus deciding custody in a manner that will not most likely benefit the child's further development. Respondent's answer is that the past is often the best indication of what the future may hold.

The West Virginia court agreed when it said that the primary caretaker rule provides a "track record" to evaluate, and that educational and economic position "pale in comparison to love, affection, concern, tolerance and willingness to sacrifice—factors about which conclusions can be made for the future most intelligently upon a course of conduct in the past." Id. at

364. It is important to note that at pages 200-201 of Volume II of the record below the trial court noted that: "It was not until the imminency of the filing of the divorce complaint that he [the Petitioner] took the child to psychologists getting ready to take his case to Court perhaps. Prior to that very little evidence of any interest at all in the father—of the father in the *welfare* of the child, very little." Emphasis added.

Respondent asserts that the case before this Court is an example of how the past is an indication of the future and indicates that, indeed, the rule granting custody to the primary caretaker and fit parent of a child of tender years is substantially related to the legitimate governmental interest of acting in the best interest of the child. For West Virginia cases stating that the best interest of the child are the primary consideration in child support matters, Respondent directs this Court to *Murredu* v. *Murredu,* 160 W.Va. 610 (1977), and *Allen* v. *Allen,* W.Va. 320 S.E.2d 112 (1984).

Interestingly enough in dissenting to the majority opinion in *Allen* v. *Allen,* Id. Justice Neely the author of *Garska* v. *McCoy, supra,* and the Judge whom is so frequently cited by the Petitioner, stated "although I strongly favor our primary caretaker-parent presumption, I do not read that presumption as providing that mothers will invariably get custody." *Allen* v. *Allen, supra,* at 118. In *Allen* v. *Allen,* Id. Justice Neely would have granted the father custody as in his opinion the father was the primary caretaker.

The case is clearly not a situation where "the State spites its own articulated goals" when custody is granted to a primary caretaker. *Stanley* v. *Illinois,*

supra, at 652. The articulated goal of the State of West Virginia is to award custody of children in a manner that is in the best interests of the children. The primary caretaker rule is a legitimate, rational and reasonable and substantially related means of accomplishing that goal.

2. The Primary Caretaker Presumption Formulated by the West Virginia Supreme Court of Appeals Does Not Conflict With This Court's Application of the Due Process Clause of the Constitution.

Again, Respondent believes that an examination of the instant case in light of *Stanley* v. *Illinois, supra,* indicates that Petitioner's assertion is without merit.

As Petitioner, citing *Stanley* v. *Illinois,* noted at page 14 of his petition:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interest of both parent and child. 405 U.S. 645, 656.

As has been discussed earlier, in *Stanley* v. *Illinois,* there was an absolute statutory presumption that all unwed fathers were unfit parents and as such were not afforded an opportunity to prove their fitness. In this case, the presumption is that a primary caretaker who is a fit parent must be granted custody of a child of tender years. However, in West Virginia, each parent is afforded the opportunity to prove that he or she was the primary caretaker prior to separation and

is a fit parent. There is *no* presumption of any kind that one parent or the other should have custody.

Additionally, while the ten criteria for determining which parent should be granted custody set out in *Garska* v. *McCoy, supra,* look to the past in an attempt to ascertain the future, the trial court is not prohibited from examining other pertinent criteria. All that is required of the trial court is that the court *initially* consider those ten items. Id. at 363. Then, the court can consider any number of things in determining what is in the best interest of the child. The "present reality" in West Virginia and in most states is that the mother is the primary caretaker of infant children and that she is most always a fit parent. Consequently, it is most often the mother who will be awarded custody.

That the Petitioner was not afforded due process is a ludicrous assertion. The record in this case consists of over 400 pages. Twenty witnesses testified; nine (including Petitioner) on behalf of Petitioner. The hearing lasted two days. All this occurred *after* the parties had stipulated that the Respondent was the primary caretaker of the child. As stated earlier, upon the conclusion of the hearing the trial judge found that prior to the divorce proceeding, *very little* evidence existed as to Petitioner's concern for the *welfare* of the child. This Court has long held that a party who seeks and is given the opportunity in State court to litigate rights claimed by him cannot have the judgment reviewed in this Court on the grounds that his constitutional rights were denied because the litigation did not result successfully. *Remington Paper Co.* v. *Watson,* 173 U.S. 443, 451 (1899).

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The primary caretaker rule as applied in West Virginia does not conflict with this Court's decision regarding sex discrimination. There is no discrimination. Even if the rule does discriminate against the Petitioner, such discrimination is substantially related to the important governmental interest of acting in the best interest of a child of tender years. Further, the Petitioner had a full and fair hearing. He cannot now claim due process.

Respectfully submitted,

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